SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1900.

No. 419.

FOURTEEN DIAMOND RINGS, EMIL J. PEPKE, CLAIMANT, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION.

ARGUMENT IN REPLY

BY

CHARLES H. ALDRICH.

May it please the Court:

It is not profitable to discuss conceded propositions or propositions not involved in the case under consideration.

I therefore propose to eliminate those subjects which I conceive not here involved, though the learned Attorney-General has devoted a large part of his brief and argument to their consideration.

I concede:

1. That the United States have power to acquire territory by discovery, cession, or conquest.

2. That Congress has power to govern territory.

3. That the people inhabiting such territory have no inherent political rights. Congress may give or withhold such rights at its pleasure.

We need enter into no discussion as to whether the United States can acquire territory without incorporating it into the United States. It is sufficient for this argument that in the treaty now under consideration no attempt has been made to do so. There is not a word or syllable restrictive in character, so far as the territory acquired thereunder is concerned.

Nor is it necessary to discuss now the status of the native inhabitants of these territories, or the power of Congress to withhold a determination of that question until a later date.

The sole and only question is whether Congress has unlimited discretionary power to legislate for these possessions, in all cases whatsoever, unrestrained by and not subject to the Constitution. The Attorney-General affirms such power. We deny it.

The fact that the Attorney-General has devoted so much space and time to matters not here involved can only be accounted for on the ground that he deems their consideration necessary to sustain the extraordinary powers claimed in behalf of the legislative and executive branches of our Government.

If the limits of time and issues permitted I think the difficulties of admitting the application of the Constitution to territorial possessions would be found imaginary rather than real. There is no occasion for the possession of such powers by Congress.

This court has often remarked upon the importance of a consideration of the circumstances surrounding the convention which framed the Constitution and the history of the times preceding its adoption. These controlled its *action*. This history is therefore a subject of judicial notice, and through such aid controversies which otherwise would have been enveloped in doubt have frequently been easily solved.

It is doubtful if, in the entire course of constitutional interpretation, an appeal to history could be more profitably made than in the case at bar.

When, in 1763, Townshend and Grenville conceived the idea of taxing the American colonies through taxation of their commerce a contest was begun which led to the Declaration of Independence and the formation of the Government of which this court is one of the

coordinate branches. The fundamental principle of the stamp act, the navigation act, and other acts designed to do away with "the requisitions from the King," upon which the provincial assemblies had been accustomed to deliberate and grant or withhold at their pleasure, and to substitute in their stead immediate taxation of the colonies by the Parliament of Great Britain, was embodied in the resolution of three years later, affirming the absolute power of Parliament over the colonies "in all cases whatsoever."

The petitions from the various provinces, the *remonstrance* from Virginia, as well as the words of the leading patriots and statesmen on this side, asserted that under her constitution England had no power to levy taxes upon the colonies without their consent, and that it was the birthright of English citizens that their property should only be voted in assemblies in which they were represented. It is unnecessary to trace the history of this struggle in England and the colonies through the eventful years which followed. The subject was one of the most important that ever engaged the intellect of man; it may be doubtful if more ability was ever engaged in an intellectual or political contest; petitions grew to remonstrances and these to union and armed resistance.

The consensus of opinion from that time to the present has been that the success of the colonies marked the most important political achievement of the human race, and that the principles of liberty and self-government were then for the first time established among mankind.

The success of the war for independence only partially achieved this result. In the long struggle for liberty and the wide discussion of its principles, ideas had permeated all classes in this and other countries which brought liberty home to each individual, each local community, each colony, in that exaggerated form which made individualism too prominent and threatened to make organization of political and social forces on a scale commensurate with the necessities of government, as against anarchy or foreign conquest, almost impossible.

We entered upon the second period of our growth towards union and gradually developed from independent colonies through the Confederation to the Constitution. It is not necessary to trace this development minutely. It is sufficient to note that the difficulties were still those of exaggerated ideas of the value of individual and local liberty. Each citizen desired his State to be independent and was jealous lest in any plan for a more perfect union it should be sacrificed in some respects for the whole, and through the establishment of a too powerful central government *his* liberties again be imperilled. The independent commercial regulations by which trade was grievously injured through the effort to attain local advantage would appear foolish to one not understanding the spirit of the times.

On the other hand, the principles which first made necessary organized society among men were at work; unlimited individualism must end in anarchy. This is as true of States situated as these were as of persons. The necessities of the situation compelled harmony. The debt, the destruction of revenues through State jealousies, the scant respect of their rights shown by foreign powers, made the Constitution possible and finally compelled its adoption.

Through all this history there is no assertion of the unlimited power of Congress or the President to govern colonies; there is no hint in

any debate that the principles relied upon to justify the separation from Great Britain were erroneous and that unlimited power in Congress or the President would in anywise be more consistent with liberty than the same power in Parliament and the King. It is apparent in all the discussions that it was the purpose of the framers of the Constitution that a government of limited powers only should be established. As we have seen, the spirit of the times was such that the Constitution had failed of adoption if more had been attempted. As it was, it did nearly fail, because it contained no bill of rights, and many of the conventions elected by the people to consider its adoption demanded that this defect be at once remedied, and hence the first ten amendments proposed by the First Congress.

The ninth and tenth are material to this controversy:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."
>
> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

These amendments crystallize the political fears of the time regarding the Federal Government and have furnished the rule of construction for all time as to the scope and extent of its powers.

They in no way diminish the extent and fullness of the powers delegated. By clause 18, sec. 8, Art. I, of the Constitution, Congress is empowered "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

From these have arisen those general principles of constitutional interpretation so frequently announced by the court that the Federal Government is one of enumerated or delegated powers and the Constitution one of enumeration, not of definition. Though limited to specified objects, its power is plenary as to those objects. Those auxiliary powers, those appropriate to the execution of other powers singly described, are as expressly given as any other powers, with the limitation that no power in itself a substantial one, and no prohibition stated in the Constitution can be exercised or avoided under an auxiliary power.

It is in the light of this brief statement of the origin of our Government and these accepted canons of construction that I desire to consider the question here at issue.

The Attorney-General's brief contains many conceptions concerning the power of the National Government which no counsel has heretofore had the temerity to assert in this court without disguise, and which, if adopted here, will vest in Congress powers long denied to the British Parliament. He says (p. 13):

> "In ordaining the Constitution and fixing the powers of the various instrumentalities created thereby, the reliance of the people was not more on express prohibitions or restrictions than upon the sense of justice and the patriotic purpose of their own representatives whose policies and action are open to popular review and correction at stated periods by means of Congressional elections."

If this means anything, it means that we are to find the extent and limits of the National Government, not in the Constitution, but in the responsibility of Congress to the people through biennial elections. In the debates in the various States upon the question whether the Constitution should be accepted it was pointed out that abuses of powers granted could be thus corrected, but it was never before asserted that such responsibility was a grant of power.

This very distinction between our Government and that of England was discussed at length by this court in *Hurtado* v. *California*, 110 U. S., 516.

Mr. Justice Matthews said:

> "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. * * * The omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of free public opinion represented by the Commons.
>
> "In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of powers delegated to their governments, and the provisions of *Magna Charta* were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial. . . .
>
> "Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

And he quoted Mr. Justice Miller, in *Loan Ass'n* v. *Topeka*, 20 Wall., 655, 662, as follows:

> "There are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives and liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depositary of power, is after all but a despotism. It is true it is the despotism of the many, of the majority, if you choose to call it so, but it is nevertheless a despotism. It may be doubted, if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness and the security of which is essential to that happiness under the unlimited dominion of others, whether it is not wiser that this

power should be exercised by one man than by many. *The theory of our governments, State and national, is opposed to the deposit of unlimited power anywhere.*"

The Attorney-General is kind enough to admit that there are some things Congress can not do, because of the spirit of our institutions, though he asserts it is unrestrained by its letter. But why appeal to the spirit when the case is covered by the letter?

Why not admit with Mr. Webster, in his great argument upon nullification, that this is a Government of limited powers and that whenever a federal power is exercised the person exercising it should be able to point to some clause of the Constitution as the justification for its exercise?

We hear much about the sovereignty of the United States in the arguments addressed to the court asserting that, while the founders of our institutions denied the omnipotence of Parliament, they decreed an omnipotent Congress over territories or colonies. We are told this is a sovereign nation and has all the powers of any other nation as such. I do not abate one jot or tittle from my country's greatness, though I utterly abhor the doctrine of national sovereignty you are here urged to adopt.

I concede we are a great nation, possessed of great powers, and perhaps the words sovereign and sovereignty have passed into such common and frequent use that it is no longer possible to protest against them, as Mr. Webster did in one of his great arguments, as unfitted to the character of our institutions and more appropriate to the other side of the Atlantic. It is well, however, to be precise in terms. What is meant by the assertion that the United States are a sovereign nation and as such possessed of all the powers of any other nation? If nothing more is intended than to assert that, in the exercise of the powers granted, the United States may use all the means appropriate to carry out such powers, I concede the proposition. As this court has held, questions of power do not depend upon the degree to which it may be exercised, but it may be exercised, if at all, at the will of those in whose hands it is placed. (*Brown* v. *Maryland*, 12 Wheat., 419; *Martin* v. *Hunter*, 1 Wheat., 304.)

The learned Attorney-General uses the term in no such restricted sense. It is used here as it has been in Congress in the sense that what any other nation may do in the exercise of the war power and the government of territory and people acquired by cession or conquest, the United States are permitted to do, not because of anything within the Constitution, but from the fact that we are a nation among the so-called powers of the earth.

For example, after quoting with great emphasis the assertion by the signers of the Declaration of Independence that the colonies, "as free and independent States, have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do," the learned Attorney-General argues that at the time this declaration was made all independent States or nations claimed and exercised the right to acquire, hold, and govern foreign dependencies, and no State or nation then recognized its obligation to confer on the people of such acquired territory the rights, privileges, and immunities enjoyed by the people of the home government, except at its own will and discretion. If the Amer-

ican States, when acknowledged to be sovereign by the King of Great Britain, rested under an obligation then resting on no other independent State, then success, great as it was, did not secure to them the full right to do "all the other acts or things which independent States may of right do."

This is a fair statement of the Attorney-General's contention in the case at bar.

In the first place, the powers declared by the Declaration to belong to the States are all powers relating to the external relations of these States with other States. They have nothing to do with the relation of these "free and independent States" to the people subject to their jurisdiction. Having resolved for reasons which negative the contention of the Government that they would not longer remain subject to Great Britain, and that they would enter the family of nations, they gave notice of their claim to the right to "levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent States may of right do." This was necessary to induce other nations to recognize the condition of war, have their flag respected, and secure the alliances which they hoped would follow their separation from Great Britain.

This was a mere declaration of independence which Mr. Hall (International Law, 4th ed., par. 10) defines as the power of giving effect to the decisions of a will which is free in so far as absence of restraint by other persons is concerned. Speaking of independence, this author says:

> "It merely secures to a State with respect to other States a general liberty of action within the law as defined by the other rights and by the duties of a State. A State is enabled to determine what kind and amount of intercourse it will maintain with other countries, so long as it respects its social duties, and by what conditions such intercourse shall be governed; it is permitted to form relations of alliance or of special friendship; it may make contracts containing any provision not repugnant to the law, and it may demand and exact reparation for acts done by other States which it may consider to be wrongs."

The author continues:

> "The second branch comprehends a group of rights which go by the name of rights of sovereignty. The state community, in virtue of the supremacy of its common will over that of its individual members for the ends contemplated by it as a political society, puts them under obligations by its political, civil, and criminal legislation which are not only exclusive of all other like obligations within the national territory, but are not necessarily extinguished as between them and their own State when they enter a foreign country or some place not within the jurisdiction of any power."

Sovereignty thus embraces two conceptions:

First. The conception of a state independent from other states in the exercise of its will. In this sense the United States of America is a sovereign power in that its will is not subject to the will of any other government.

It may be remarked that there is no absolute unrestrained sovereignty even in this sense, as the body of law known as international law and

"intended to reflect the essential facts of civilization so far as they are fit subjects for international rules" operates as a limitation on this kind of sovereignty. (Hall, International Law, 4th ed., pp. 54–55.)

Second. With respect to the sovereignty existing in the state in virtue of its supremacy over the individual members for the ends contemplated by it as a political society, it can not be necessary to assert in this court that there are many limitations. The Federal and State constitutions have been framed to define and declare these. There are no other kinds of sovereignty than the two here enumerated.

I concede that in the first kind—*i. e.*, the relations of the United States to other nations—our Government is a sovereign State, and has the right and as such "free and independent State has full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do." In this relation it is correct, as I conceive, to speak of the United States of America as a unit and use a singular verb.

It is such unit and has this power because there was created a Government upon which the people conferred these powers. If war is declared, it must be under the Constitution; if peace is concluded, it is in the exercise of a constitutional power; if commerce is established, it is because Congress, under the Constitution, was given power to regulate commerce; if alliances are contracted, it can only be done under the Constitution.

In short, the sovereign nation exists through the adoption of the Constitution, and its powers are derived from that instrument and must be found, as this court has often declared, in the language thereof or by necessary implication therefrom. We are in the Philippines and Porto Rico and can be rightfully there only in the exercise of some of these enumerated powers, as in the language of the tenth amendment, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This amendment designates the Constitution as the source of the power of the United States, and excludes the idea of power free from constitutional restraint derived by implication from powers delegated by the Constitution.

Nor is it true that at the time this declaration was made all independent states or nations claimed and exercised the right to acquire, hold, and govern foreign dependencies, and no state or nation then recognized its obligation to confer on the people of such acquired territory the privileges and immunities enjoyed by the people of the home government, except at its own will and discretion. It is true that all independent states claimed and exercised the right to acquire territory, but if it were important in this case I think the arguments of Pitt, Camden, and Barré could be used to establish the proposition that under the British constitution, as it then was, that nation had from the time of King John and the great charter until King George recognized that its subjects had essential rights not dependent upon the "will and discretion" of the home Government. It is unnecessary to follow that subject here. It is sufficient that the Declaration of Independence was brought about by the assertion on the part of King George and his ministers of precisely the present doctrine of this Administration and its representatives in this court. If value is to be attached to contemporary history, that fact can not be lost sight of. The speeches

of Grenville and Townshend in favor of unlimited power on the part of Parliament over the American colonists and their affairs have been substantially parodied in Congress by the advocates of unrestrained power over our "colonies," as it is now unfortunately fashionable to denominate them. The signers of the Declaration of Independence held that, as subjects of the British constitution, there was no right to impose taxes upon them without their consent, to deprive them of trial by jury, to deprive them of their legislatures, and to declare Parliament invested with power to legislate for them "in all cases whatsoever." These and other grievances were held denials of rights belonging to every British subject as such and to justify rebellion and war.

It seems impossible that a people who rebelled for such reasons established a State invested with the very power which they had denied to the British Government and the assertions of which made rebellion necessary.

This argument, that the power to declare war and conclude peace carries with it, as an auxiliary, power to do whatever other nations are accustomed to do with the people and territory acquired through the exercise of these powers, has a remarkable likeness to the arguments put forward at the beginning of the century with reference to the alien and sedition acts. The supporters of the constitutionality of these acts claimed that the common law had been introduced and become a part of the Constitution of the United States, and therefore the powers usually exercisable under the common law could be exercised by the Congress of the United States in the respects involved in those acts. Mr. Madison's letter discussing this contention was answered so far as it asserted the right of a State to nullify an act of Congress, but was never answered so far as it denied the existence of the common law as a part of the Constitution of the United States. His objections to that contention, succinctly stated, were that if the common law was a part of the Constitution, then there were no constitutional limitations. Congress, like Parliament, could legislate in all cases whatsoever; that the President would be possessed of the royal prerogatives (as is now claimed in this case by the Attorney-General); that the judiciary would have a discretion little short of legislative power; that these powers in the different branches of the Government would not be alterable, because, being in the Constitution, they could only be repealed by amendment of that instrument; and, lastly, that the Constitution would have a different meaning in different States, inasmuch as the common law was different in such States, and that it would lack the certainty which a constitution should have, as the common law was an ever growing or varying body of law, and therefore, with reference to the proper action of the Government in each instance, the question would be important as to what portion of the common law was in the Constitution and what not so embodied.

Nearly every sentence of Mr. Madison's able argument with reference to the common law as a part of the Constitution is applicable to the contention that sovereign powers, so called, as derived from or defined by international law, became a part of the Constitution of the United States through the delegation of the powers to make war, conclude peace, and make all needful rules and regulations respecting the territory and other property belonging to the United States.

This court has adopted the view of Mr. Madison. It is hoped that

the child of the old error by which again the executive and legislative power is sought to be enlarged through the incorporation into the Constitution of "the sovereign power of other nations" will receive the same answer.

In fact, we submit that this court has already held that sovereign power in the sense that the words are used in the law of nations as prerogative rights of the King or Emperor not only is not vested in the United States or in any branch of its Government, but can not be so vested. The sovereign power is with the people. In leaving it with the people our Government marked a departure from all that had previously existed.

In *Pollard's Lessee* v. *Hagan*, 3 How., 212, there was involved the extent of the interest of the United States in the rivers in Alabama and the lands adjacent thereto. Mr. Coxe in argument said:

> "Prior to the treaty by which the United States acquired this territory the former sovereign claimed and exercised the rights which the United States have undertaken to exercise. But it is said that we must show that our Government could be the recipient of this power. Suppose we can not. Then the right must remain in Spain, which would be a strange result. But we say:
>
> "1st. That portion of sovereign power which is vested in the United States by our Constitution and laws is unlimited.
>
> "2nd. The exercise of power by any department or functionary of the Government, as among and operating on ourselves, is limited.
>
> "3rd. The sovereign power as a nation in its foreign intercourse is subject to no constitutional restraint."

The court said:

> "If it were true that the United States acquired the whole of Alabama from Spain, no such subsequences would result as those contended for. It can not be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives, and much less can it be admitted that they had capacity to receive or power to exercise them. Every nation acquiring territory by treaty or otherwise *must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it.* Vat. Law of Nations, b. 1, ch. 19, s. 210, 244, 245, and b. 2, ch. 7, s. 80."

In *Martin* v. *Waddell*, 16 Pet., 410, Chief Justice Marshall said:

> "When the Revolution took place, the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution."

In *Gibbons* v. *Ogden*, 9 Wheat., 196, Chief Justice Marshall said of the power to regulate commerce:

> "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."

In *New Orleans* v. *United States*, 10 Pet., 662, 735, the court, speaking of the claim that the sovereign rights of the Kings of France and

Spain passed to the United States in the cessions of the Louisiana territory, said (Mr. Justice McLean):

> "The Government of the United States, as was well observed in the argument, is one of limited powers. It can exercise authority over no subjects except those which have been delegated to it. *Congress can not by legislation enlarge the Federal jurisdiction, nor can it be enlarged under the treaty-making power.*"

In the discussion of those cases relating to the power of Congress over the Territories we shall see that the court has only asserted its plenary power subject to all the prohibitions of, and substantive rights guaranteed by, the Constitution.

It thus appears that "sovereignty," "sovereign power," and other terms of like import which have become so popular since a colonial policy to which an application of the Constitution might be inconvenient was entered upon, can have no acceptance in this court beyond the familiar one that the United States have full power to carry out all the powers delegated to them by the Constitution.

I turn now to the alleged cases of Executive action upon which the Attorney-General relies as supporting his contention in the case at bar. He states his position strongly upon this subject and promises the court (brief, p. 10) to show "that the practical construction put upon the Constitution by the Executive and Congressional branches of the Government for a hundred years has, with one partial exception, been uniform in regarding acquired territory as neither bound nor privileged by that instrument until brought within its operation, either by express compact in the treaty or by act of Congress; and that acts of Congress do not apply to after-acquired territory until extended to it by subsequent legislative enactment."

This promise is important and the facts stated would be entitled to considerable weight if true and if not opposed to decisions of this court. I contend that these two conditions do not exist.

The first case of Executive action to which the Attorney-General refers relates to the acquisition of the Louisiana territory. He cites at length from Mr. Jefferson to the effect that his constitutional difficulty related "not to acquiring territory, but to the right either of the treaty-making power or of Congress to annex it or incorporate it into the Union." (A. G. brief, p. 37.)

The aim of the Attorney-General seems to be to have it appear that Mr. Jefferson saw no difficulty in *acquiring* territory, but did see such difficulties in its admission into the Union. The inference is that Mr. Jefferson supposed that the United States could acquire and hold indefinitely as something outside of the United States. The fact is that Mr. Jefferson did not see how territory could be held at all without admitting it ultimately into the Union as a State. He used the word "Union" in the sense of "the States in Union" and not United States as comprehending the political entity designated by the name. This is shown by the language quoted upon the Government brief (pp. 33–37).

The letter to Gallatin was in January, 1803. In August of the same year he said in a letter to John Dickinson:

> "There is a difficulty in this acquisition which presents a handle to the malcontents among us, though they have not yet discovered

it. Our confederation is certainly confined to the limits established by the Revolution. The General Government has no powers but such as the Constitution has given it; and it has not given it a power of holding foreign territory, and still less of incorporating it into the Union. An amendment of the Constitution seems necessary for this."

And in his letter to John C. Breckenridge, August 12th, 1803, he said:

"The Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union. The Executive in seizing the fugitive occurrence (Louisiana purchase), which so much advances the good of their country, have done an act beyond the Constitution."

In his letter to James Madison of the same month he said:

"Further reflection on the amendment of the Constitution necessary in the case of Louisiana satisfies me it will be better to give general powers, with specified exceptions."

And to Levi Lincoln, same month:

"On further consideration as to the amendment to our Constitution respecting Louisiana, I have thought it better, instead of enumerating the powers which Congress may exercise, to give them the same powers they have as to other portions of the Union generally, and to enumerate the special exceptions."

In the one to William C. Nicholas in September, 1803, he said:

"But when I consider that the limits of the United States are precisely fixed by the treaty of 1783, that the Constitution expressly declares itself to be made for the United States, I can not help believing that the intention was to permit Congress to admit into the Union new States, which should be formed out of the territory for which, and under whose authority alone, they were then acting. I do not believe that it was meant that they might receive England, Ireland, Holland, &c., into it, which would be the case on your construction."

* * * * * * *

"Our peculiar security is in the possession of a written constitution. Let us not make it a blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty-making power as boundless. If it is, then we have no constitution. If it has bounds, they can be no other than the definitions of the powers which that instrument gives. It specifies and delineates the operations permitted to the Federal Government, and gives all the powers necessary to carry these into execution. Whatever of these enumerated objects is proper for a law, Congress may make the law; whatever is proper to be executed by way of a treaty, the President and Senate may enter into the treaty; whatever is to be done by a judicial sentence, the judges may pass the sentence. Nothing is more likely than that their enumeration of powers is defective. This is the ordinary case of all human works. Let us go on, then, perfecting it by

adding, by way of amendment to the Constitution, those powers which time and trial show are still wanting."

The first words of both drafts proposed as an amendment to the Constitution show that Mr. Jefferson felt that such action was necessary to enable the United States to hold the territory, and that only through such an amendment could the ultimate statehood be postponed.

It is perhaps unimportant to follow Mr. Jefferson's views so closely upon these subjects, because his temperament as a partisan, his ideas as exemplified in the Kentucky and Virginia resolutions, have, as I submit, justified in the minds of most students of the Constitution Dr. Von Holst's statement (1 Con. Hist. of the U. S., 160), as follows:

"Not the slightest weight should be attached *a priori* to his interpretation of the Constitution."

Mr. Justice BROWN. Is it your contention, Mr. Aldrich, that this court should be guided in its interpretation of the Constitution by the views of contending politicians or disputes in Congress upon party questions?

Mr. ALDRICH. It is not, and my only excuse for dwelling at this length upon this alleged discovery with reference to Mr. Jefferson grows out of the fact that the Attorney-General has devoted a large portion of his brief, as well as the time devoted to the argument at the bar of the court, to a discussion of Mr. Jefferson's views, and seeks to draw the inference therefrom that Mr. Jefferson saw no difficulty in *holding* territory as a colony; and I was about to remark, and have the statement upon my notes before me, that it does not seem to me wise or proper to cite the opinions of eminent statesmen and constitutional lawyers as against your own decisions. If, as is contended, these statements by this court, running from 5 Wheat. (1820) to the present time, arrived at deliberately after discussion in court by as able lawyers as ever appeared at this bar, and in the golden age of the Senate of the United States, are to be rejected as *dicta* in each case, then I put against Mr. Jefferson's acts his declarations, which I have read, showing that, in his own judgment, he was compelled to an unconstitutional act (as he supposed) by overwhelming political and national necessity. Under your decisions we may now see that his scruples about acquiring territory were unfounded. And we dismiss his conceptions of constitutional law as we do his Kentucky and Virginia resolutions, as the mistakes of a great patriot, but not a safe constitutional expounder.

To Webster's argument we answer that this court ruled against him in the *Canter* Case, *Fleming* v. *Page*, *Cross* v. *Harrison*, and *Dred Scott* v. *Sandford*, and that the Attorney-General misapplies his argument when he stands in the shadow of that great constitutional expounder and seeks to borrow his name to give credit to a colonial policy that has no limitations but the varying and ever-changing grace of the Congress of the United States.

From the Attorney-General of the United States engaged in such a contention, by which he harmonizes irresponsible and arbitrary power with beneficent assimilation, I turn to other contemporary statesmen and constitutional lawyers of to-day, whose deeds have enshrined them in the hearts of the American people, and whose learning and ability have often engaged the attention and elicited the admiration, not only

of this court, but of the American bar. Ex-President Harrison, at Ann Arbor, December 14th, said:

"Under this absolutist construction of the powers of government in territories composed like Porto Rico and the Philippines, laws may be declared by the Supreme Court to be operative, although every section of it should supervene every bill of rights in the Constitution. I will give you an outline of what might be done by such a law so that all of you can see more clearly what it involves.

"Section 1 suspends permanently the right of *habeas corpus* in Porto Rico.

"Section 2 declares attainder against all Porto Ricans who have displayed the Spanish flag.

"Section 3 declares the promotion of the native mayor of Ponce and San Juan with the titles of lord dukes of Porto Rico.

"Section 4. Any Porto Rican who shall speak disrespectfully of Congress shall be guilty of treason. On conviction, the offender shall have his tongue cut out.

"Section 5. The present church shall be the established church of the island, and nobody shall be permitted to worship God after any other form.

"Section 6. All press publications shall be submitted to the censor, and shall be printed only after he has approved the same. Public meetings for the discussion of public affairs are prohibited and no petitions shall be presented to the government.

"Section 7. No inhabitants of Porto Rico shall hold territorial office.

"Section 8. Soldiers of the island garrison shall be quartered in the houses of the people.

"Section 9. The commanding officer of the United States forces on the island shall have the right to issue any warrant of search of private houses.

"Section 10. Any person in Porto Rico in civil life may be put upon trial for capital or other infamous crimes upon the complaint of the public prosecutor, without the benefit of a grand jury; may be compelled to be a witness against himself; may be deprived of life, liberty, or property without due process of law, or his property taken for public uses without compensation.

"Section 11. The trials by the judge shall be held in secret, without a jury, in any district designated by law after the commission of the offense, and the prisoner need not be advised of the nature or cause of the arrest, shall not be permitted the assistance of an attorney, and shall have no witnesses, as the presiding judge may direct.

"Section 12. A direct tax is imposed upon Porto Rico for Federal use without regard to its population, and the tariff rates at San Juan are taxed at 50 per cent of those levied at Ponce, those at Ponce at 15 per cent of those levied at New York.

"This law was intended to sketch the possible effect if the Constitution has no standing whatever in the annexed territories.

"I say that such a law is necessary in order to sustain the legislation we are discussing. New Mexico, Arizona, or Oklahoma may be substituted for Porto Rico, if the Constitution has no relation to Porto Rico. No one supposes that Congress will ever

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make a law containing such shocking suggestions, but it is possible in any one of the Territories. * * * The man whose protection from wrong rests wholly upon the benevolence of another man or a Congress is a slave, a man without rights. * * *

"If there is anything that is characteristic in the American constitutions, State and national, it is the plan of limiting the power of all public officers and agents. 'You shall do this,' 'You may do this,' 'You shall not do this,' is the form that the schedule of powers always took in the national and in all our State constitutions. This grew out of our experience with the British Government, a government unlimited. Absolute legislative or judicial powers is un-American and, for one, I do not believe that the framers of the national Constitution or the framers of our first State constitutions were careful only of themselves."

And he concluded:

"In conclusion, I propose this sentiment: God forbid that the day should ever come when in the American mind the thought of man as a consumer shall submerge the old American thought of man as a creature of God and endowed with inalienable rights."

The Attorney-General, in answer to questions addressed to him by Mr. Justice Harlan, has asserted the power of Congress to establish in our new possessions orders of nobility and a church.

Hon. George F. Edmunds, who is justly regarded as one of the greatest living expounders of the Constitution, said:

"But the Constitution as such, I suppose all admit, is not subject to the control of Congress, either to enlarge or to diminish, extend or contract, or to be applied to or withdrawn from any people or place. It is not a movable thing, like the ark of the covenant of the Israelites, to be set up and moved here or there as the tribes might wander. *It is the actual event and condition* and *not the legislative or executive will, that must, in the nature of things, determine the status of a man or a country under it.*

"The instances in which Congress has declared in statutes organizing territories that the Constitution and laws should be in force there are no evidence that the Constitution and laws were not already there, for Congress and all legislative bodies have often made enactments that in effect merely declared existing law. In such cases they declare a preexisting truth to ease the doubts of casuists." (Letter to Senator Proctor, dated March 21st, 1900, and published in Congressional Record March 30th, 1900, p. 3737.)

Mr. Choate, in his argument for the appellants in the case of *Pollock* v. *Farmers' Loan & Trust Co.*, said:

"It must be observed that the first clause of section 8, article 1, taken by itself, gave to Congress the complete and unqualified power of taxation, only limited to national purposes, but wholly unlimited as to place. As it stood alone the power extended to every inch of the territory and to every person and every thing within the dominion of the Government created by the Constitution. As it stood alone Congress could have laid and collected taxes of every kind, direct and indirect, for national purposes, without regard to population or wealth or to State boundaries

restrained only by those fundamental limitations inherent in the very power of taxation and indispensable in the government of a free people; *but it was not part of the plan of any of them that this power in the new government should be absolute or unqualified, except as to place and persons. As to place and persons it should forever remain unqualified and reach as far and as wide as the territory of the United States and touch every person and every thing therein.* And so they proceeded to modify and to qualify this power, except as to its extent in place or space through the whole territory of the nation, and except as to its hold upon every person and thing, by prescribing the different measures by which the burden of the different kinds of taxes, direct and indirect, should be meted out. As to indirect taxes, the modification or qualification was applied by section 8. As to direct taxes, the measure was prescribed by section 2. * * *

"In dealing with these the Constitution no longer dealt with the *States or with the citizens through the States, but directly with the individual citizen—the individual* thing to be subjected to the tax. It wiped out all State lines, *ignored the States entirely, and went directly for the man or the thing, and whether he or it was found in a State or in the Territories or in the District of Columbia was all one. On all these alike the purpose was to provide for the exercise of the taxing power 'throughout the United States,' whenever it should be exercised at all. In each and every part of the territory of the United States the excise or duty laid or imposed must rest and operate.*"

It is asserted by the Attorney-General that in the application of the tariff laws the view then obtained that either Congress or the Executive could make different laws as applied to the Territories than to other parts of the United States; and he relies upon the correspondence between Mr. Jefferson and Mr. Gallatin (brief A. G., pp. 76–77), and the instructions of Mr. Gallatin to the collector (brief A. G., p. 82). The court will note that, as the Attorney-General states the case, these instructions were in force only from November 14, 1803, until thirty days after February 24, 1804. (P. 84.) The Attorney-General is sufficiently answered as to his interpretation of the practice of the United States, both with respect to Louisiana and Florida, by the following from the opinion in the case of *Cross* v. *Harrison*, 16 How., 164, 199:

"In respect to the suggestion that it has not been the practice of the United States to collect duties upon importations of foreign goods into a ceded territory until Congress had passed an act for that purpose, counsel cited the cases of Louisiana and Florida. The reply is, that the facts in respect to both have not been recollected. There was no forbearance in either instance, in respect to duties upon imports, until Congress had acted. Louisiana was ceded by a treaty bearing the date of the 30th of April, 1803, but the possession of it by the United States depended upon the terms of final ratification by the parties to it, and upon the delivery of it by a commissioner to be appointed by the French Government to receive the transfer from Spain to France, and by him to be immediately transferred to the United States. (Articles 1, 2, 4, 5.)

"The surrender from Spain to France was formally made on

30th of November, 1803, and that to the United States was done on the 20th of December, 1803. It was known in Washington, by a letter from the commissioner appointed to receive it early in January. It is said that from that time until the act of the 24th of February, or, as was provided for in the act, until thirty days after, Louisiana was not considered, in a fiscal sense, as a part of the United States; and that duties were not only not collected by the United States on importations into Louisiana, but that duties were charged on goods brought from Louisiana into the United States. *It seems to have been forgotten that our commercial intercourse with Louisiana had been the subject of legislation by Congress in several particulars from the year 1800; and that, before the revenue system could be applied, it was necessary to repeal that special legislation.* Mr. Gallatin, in his report of the 25th of October, 1803 (American State Papers, Finance, vol. 2, 48), suggested that it should be done. Congress, however, did not do so until the act of the 24th of February, 1804, was passed, by the third section of which the repeal was effected. The postponement of the operation of the act for thirty days longer was with the view to prevent any conflict of rights or interest between what would be the new regulations of commerce under the act and those which had preceded them.

"It is only necessary to say as to Florida, that the treaty of the 22nd February, 1819, was not ratified by the United States until the 19th February, 1821. In a few days afterward the act was passed extending our revenue system to it, subject to the stipulation in the 15th article of the treaty in favor of Spanish vessels and their cargoes. There was, then, no interval in either instance where duties were not collected upon foreign importations, because Congress had not legislated for it to be done."

The Attorney-General's misconception of the practice in Florida is equally glaring, though more justifiable, as it finds a certain basis in the language of Chief Justice Taney in *Fleming* v. *Page*, where he said:

"After Florida had been ceded to the United States and the forces of the United States had taken possession of Pensacola, it was decided by the Treasury Department that goods imported from Pensacola before an act of Congress was passed erecting it into a collection district, and authorizing the appointment of a collector, were liable to duty. That is, that, although Florida had, by cession, *actually become a part of the United States*—

the court will note that here again is a recognition that cession makes the territory a part of the United States—

and was in our possession, yet under our revenue laws its ports must be regarded as foreign until they were established as domestic by act of Congress; and it appears that this decision was sanctioned at the time by the Attorney-General of the United States, the law officer of the Government."

An examination of the opinion of the Attorney-General in the case of the *Olive Branch* shows (1 Op. A. G., 483) that the *Olive Branch* cleared from St. Augustine July 14, and possession of East Florida was delivered July 17th, 1821. He held that her cargo was imported into Philadelphia from a foreign port or place. He also held that a

bona fide importation of goods into the Floridas previous to the delivery of possession was an affair between the importer and the Spanish Government, of which the Government of the United States had no right to complain. He was also of the opinion that a *bona fide* importation into Florida from Havana prior to the delivery of possession, and after such delivery their shipment to another port of the United States, would not subject them to duty, because at such time "the Floridas were not foreign ports and places." It may be well to note in passing that the imaginary danger of foreign importation through these possessions into other parts of the United States is here well disposed of.

The temporary act extending the customs laws over the Territory was approved March 3, 1821. (3 Stats., 639.) The shipment, therefore, was from a port yet in the possession of a foreign power, and the case was ruled by the principles of *United States* v. *Rice*, 4 Wheat., 247, 254 (1819), and the examples following the cession of Louisiana before possession was taken. It is to be noted also that the Attorney-General's opinion was contrary to the court's statement, and that the shipment was subsequent to the act of Congress, not before.

It is not to be supposed that Chief Justice Taney, in reaching this decision in 1849, in which he concluded his opinion with a denial of the doctrine of federal sovereignty, for which the learned Attorney-General is contending in this case, and stated that as our Government is one of delegated and limited powers it was unnecessary to go into an examination of the writers on the laws of nations or of English precedents, intended to assert a different view than the one expressed in the two cases which soon followed. The language of the court upon this subject has been recently quoted by this court (*United States* v. *Wong Kim Ark*, 169 U. S., 649, 710).

The case of *Cross* v. *Harrison*, 16 How., 164, decided in 1853 was the first of these. It has been sufficiently quoted in our principal brief and likewise in that of the Attorney-General. The latter admits that President Polk's Administration came to a different conclusion than had been entertained by some of the earlier Administrations as to the *status* of acquired territory and the relations of the Constitution thereto. The records of the time show that the question had the most painstaking consideration in the Executive Departments, and it will not be denied that the determination then reached has been consistently followed from that time to the incoming of the present Administration.

The *dicta* of *Fleming* v. *Page* based upon misunderstanding of facts are inconsistent with much that is said in *Cross* v. *Harrison*. But in their essential principles the cases are in harmony. It is probable that the misunderstanding arose from the so-called Texas case.

Congress passed a joint resolution for the annexation of Texas in March, 1845. These resolutions were approved by the Texan government, and after such approval Mr. Robert J. Walker held that goods imported into the United States from Texas were dutiable until further action by Congress. This holding by the Secretary was prior to the admission of the State into the Union by act of Congress on December 29, 1845. The Republic of Texas had adopted a constitution between March 1st and December 29th, 1845, which met the approval of Congress on the date last given. It is true that Mr. Walker in his circular misapprehended the effect of the Louisiana and Florida cases (1

Mayo, 375), and it is likewise probable that Chief Justice Taney was misled, as I have shown, by this circular, and did not look for information beyond its statements. Upon the acquisition of Alaska, the conclusion reached in *Cross* v. *Harrison* that commerce between newly acquired territory and other portions of the United States was not subject to duty was enforced by the ruling of the then Secretary of the Treasury (Syn. Dec. Treas. Dept., 1868, pp. 10, 20), and as we have noted in our principal brief, Mr. McKinley said in 1899 (Message 1899, p. 50):

> "Our plain duty is to abolish all customs tariffs between the United States and Porto Rico and give their products free access to our markets."

Mr. Justice SHIRAS. Did he mean to state that it was the duty of the President or of Congress?

Mr. ALDRICH. I understand that he meant to say that it was the duty of the nation and because the territory had become a part of the United States.

Another case of alleged Executive action referred to in the Attorney-General's brief grows out of the controversy between General Jackson and Judge Fromentin. (A. G., brief, pp. 94–95.) In the argument of this question the Attorney-General ignores the fact that the decisions holding that Territorial courts are not United States courts within Article III of the Constitution of the United States, are grounded upon the language of that article, and in no way relate to the question of the powers of Congress in the Territories. The question, therefore, in the Fromentin case, as to the power of that judge to issue a writ of *habeas corpus*, did not depend upon whether the Constitution extended to Florida or not; it depended upon the commission which Judge Fromentin bore. An examination of that commission shows that he was appointed "judge of the U. S. for West Florida, and that part of East Florida which lies westward of the Cape," and he was authorized to "execute and fulfill the duties of that office according to the Constitution and laws of the United States."

On March 3rd, 1821, ch. 39, Congress had passed an act providing—

> "that until * * * all the military, civil, and judicial powers, exercised by the officers of the existing [Spanish] Government of the same Territories, shall be vested in such person, or persons, and shall be exercised in such manner, as the President * * * shall direct for the maintaining the inhabitants of the said Territories in the free enjoyment of their liberty, property, and religion; and the laws of the United States, relative to the collection of the revenue, and the importation of persons of color, shall be extended to the said Territories; and the President is * * * hereby authorized * * * to establish such districts, for the collection of the revenue, and * * * to appoint such officers to enforce the said laws, as to him shall seem expedient."

Mr. Adams (Secretary of State), in his letter to Judge Fromentin, dated October 26, 1821 (Annals of Congress, 17 Congress, vol. 2, p. 2379), said:

> "I am directed to inform you that the laws of the U. S. relative to the revenue and its collection, and those relative to the slave trade, having been the only ones extended by act of Congress to

the Territories of Florida, it was to the execution only of them that your commission as judge of the United States was intended to apply. The President thought the authority of Congress alone competent to extend the laws of the United States to the newly acquired Territories; *nor could he give to the judge a jurisdiction which could only be conferred by them.* There being an essential difference between the nature of the powers heretofore exercised by the Spanish authorities * * * and of the laws of the United States, which were extended to those provinces by that law, the President considered it his duty to entrust the execution of *each branch* to officers specially appointed for the purpose."

I will not spend time in argument that this incident is not one to warrant the Attorney-General in borrowing the names of Andrew Jackson, Mr. Madison, Mr. Monroe, or Mr. Adams to support his contention that they conceded the right of Congress to govern colonies without reference to the Constitution, or that Congress could exert any powers not provided for in that instrument.

The next case of alleged Executive or Congressional action tending, as the Attorney-General supposes, to support his contention that Congress has, from the first, ignored the constitutional requirement of uniformity in its treatment of imports and excises, is that of the internal-revenue laws. (A. G., brief, 104–105.) He states that "it was not until 1868 that the internal-revenue laws, as to spirits and tobacco only, were extended to apply to all places within the exterior boundaries of the United States." If it is intended by this proposition to deny that internal-revenue laws had any application to the Territories of the United States until 1868, we are compelled to take issue with the Attorney-General upon his statement of the fact. As stated by him, the first internal-revenue law was passed on the 3rd day of March, 1791. (1st Stats., 191–202.) Section 15 of that act provided "that upon all spirits which after the said last day of June next shall be distilled within the United States from any article of the growth or produce of the United States, etc." In numerous sections of this act the words "throughout the United States," or "within the United States," are used; in other words, the language is inclusive of the Territories. Several laws of this character were enacted between 1791 and 1802. It is unnecessary to follow them in their details. In this first act it was provided "that the United States shall be divided into fourteen districts, each consisting of one State, but subject to alterations by the President of the United States from time to time by adding to the smaller such portions of the greater as shall, in his judgment, best tend to secure the facilities and collection of the revenue, etc." The Attorney-General seems to suppose from this fact that an intention was evinced not to include the Territories in the general term, United States.

Our contention is that in these enactments, and in subsequent ones, language inclusive of the Territories in character was used, and that if supervisors and inspectors were not appointed to collect revenue in the Territories it was only for the reason explained by Chief Justice Marshall in *Loughborough* v. *Blake* that the cost of collection would exceed the revenue derived therefrom. An intention to make the Territories contribute to all taxes and revenue is evinced in the fact that the ordinance for the Northwest Territory provided that the inhabitants of the Territory should be subject to pay their share of the duties and expenses of the Federal Government "to be apportioned on them by

Congress, according to the same common rule by which apportionments thereof shall be made on the other States;" and this covenant on the part of the Territory was accepted by the First Congress (1st Statutes, 50); *and, on July 11th, 1798, the court will find that a salary is provided for the supervisor employed in collecting the internal revenues of the United States for Ohio, then a Territory.* (1st Stat., 591.) It is not necessary to follow at length the Attorney-General's discussion of the importance of the application of the internal-revenue laws to the States only as affording a precedent in the case at bar. The implication which would be drawn by a careless reading of the Attorney-General's brief is that we have had internal-revenue laws throughout our entire history, and that Congress had never extended them to the Territories until 1868. The fact is, that upon the incoming of Mr. Jefferson's administration his party stood pledged to repeal, and did repeal, the internal-revenue laws then in force. In Mr. Randolph's report from the Committee of Ways and Means, under date of March 8, 1802, he said:

> "To produce, therefore, into the Treasury something less than $600,000 an expense must be incurred more than equal to one-fifth of that sum; and upwards of 400 revenue officers, exclusive of the inspectors, must be maintained at the public charge. * * * Of the proceeds of these duties more than $500,000 arise from the tax on distillation, which are paid by 22,000 country stills scattered over the immense territory of the United States. 65,000 other dollars are the product of 13,000 retailers' licenses. These facts demonstrate the difficulty of materially lessening the expenses of collection, so long as the subjects from which the revenue is to be drawn are so thinly dispersed over this widely extended country."

The party battle cries of that year were the alien and sedition laws, and the danger to republican institutions arising from the "hordes" and "swarms" of Federal officeholders with their authority to invade the premises of the citizen in their search for objects of taxation.

When the war of 1812 occurred and the embargo was proclaimed, the party that demanded the repeal of internal-revenue taxes were compelled, through Mr. Gallatin (then Secretary of the Treasury), to recommend that they be again imposed, and this was done. They only continued in force for a few years and we had no internal-revenue taxes until 1862. In the latter year, July 1st, 1862 (12 Stats., 432), an internal-revenue law was enacted of a very sweeping character. Section 2 provided that "for the purpose of assessing, levying, and collecting the duties and taxes hereinafter prescribed by this act, the President of the United States be, and he is hereby, authorized to divide, respectively, the States and Territories of the United States and the District of Columbia into convenient collection districts"—language which does not support the statement of the learned Attorney-General, above quoted from page 105 of his brief. In the act of the 30th of June, 1864 (13 Stats., 306), it was provided "that wherever the word State is used in this act it shall be construed to include the Territories and the District of Columbia, where such construction is necessary to carry out the provisions of this act." It is thus apparent that the argument based upon the supposed application of the internal-revenue laws to the States only falls to the ground and finds no support in any act of Congress. If internal revenue was not collected at any period

in our history within the limits of the Territories, it was because it was impracticable to attempt to collect it, and not because the laws were not framed on a basis which permitted such collection.

It is also apparent that when properly understood there has never been a case of Executive action in any department of the Government from its beginning to the present time which is inconsistent with the contention in behalf of the claimants that upon the grant of territory to the United States it becomes a part of the United States from the date of possession taken under the grant, and as such is within the provisions of the Constitution of the United States to the effect that all duties, imposts, and excises shall be uniform throughout the United States, and forbidding the levying of any tax or duty on articles imported from any State, or the giving of any preference by any regulation of commerce or revenue to ports of one State over those of another, or requiring vessels bound to or from one State to enter, clear, or pay duties in another.

The question of ports and the prerogative right to establish them has no application to the Pepke case. The reason of the rule rests in the protection of the revenues and of the country against attack from without. When Congress was given the power to regulate commerce this included foreign commerce and the coastwise trade. This must be admitted. The exception recognized by the common law has also been recognized in our practice. The King's ships are not limited to the right of landing at or sailing from established ports as are merchant vessels. Public transport vessels engaged in the transportation of troops and munitions of war require no clearance or ship documents from any customs officer. Such a vessel has a right to sail from or to any harbor without other authority than that of the commanding officer.

Pepke had purchased the property in Luzon, as he had a right to do. He was not a merchant nor engaged in mercantile pursuits. There is nothing to show that he bought with the purpose of bringing the rings into the United States. He was ordered here by a superior officer and brought here with other officers and soldiers on a United States transport vessel. So far as his case is concerned, there was no importation, and the question of ports or no ports is immaterial.

It is submitted that his case must be reversed entirely aside from the main question.

The California and Florida cases illustrate what has been done in Porto Rico and the Philippines. As a military measure the ports existing at the time of seizure and established by the former sovereign are continued as ports to secure contributions from the enemy. This is in exercise of the war power. International law has steadily advanced the interests of unrestricted trade. While it recognizes the right to blockade ports where aid and comfort to the enemy may accrue if they remain open, it also favors open ports where one contestant has become the full possessor of the country. The right to close is admitted. The practice is to leave them open under such conditions as prevailed at Tampico, St. Augustine, San Francisco, and, later, Manila and Porto Rico.

Manila and Porto Rico were ports under Spain. They were continued such *de facto* by the action of the military authorities. This conformed with the practice of nations, which does not favor the absolute cessation of commerce, which might in a conceivable case bring

financial ruin and perhaps starvation to a conquered people. It is, therefore, customary to provide in the treaty for continuance of commerce in the ports of the ceded territory. This was done in the Louisiana, Mexico, and present case.

Articles IV and XV of the treaty give Spain, in commercial matters, the same right in these ports as the United States, and Art. XIV recognizes the cession of ports as such.

The government is a *civil* government from the treaty of peace. It is so stated in *Cross* v. *Harrison*. The acts of July 20, 1790 (1 Stat., 135), relating to tonnage, and of March 2, 1799 (1 Stat., 627), relating to duties on imports and tonnage, the court said, "were also of force in California without other special legislation declaring them to be so."

I now turn from these alleged precedents of Executive action to the decisions of this court, where the last word must always be spoken upon all constitutional questions.

It is conceded that the United States are authorized to acquire territory by discovery, cession, or conquest.

By the treaty of Paris, Spain ceded these islands to the United States. They became the property of, and, as we contend, a part of the United States. A large part of this discussion hinges upon the question whether they, *with their people*, became by this cession simply property of the United States, or whether they became with their people an integral part of the United States, meaning by that term the same as Mr. Chief Justice Marshall defined it in *Loughborough* v. *Blake*, 5 Wheat., 317, "our great Republic, which is composed of States and Territories." It is conceded that by this cession the islands became a part of the United States in an international sense. It is, however, contended that they did not and can not become a part of the United States in a constitutional sense until Congress shall, if ever, choose to extend the Constitution over them. As the political department of the Government has accepted the islands as a settlement of the war and entered into possession and is exercising jurisdiction therein, this court is bound to assume that it is United States territory (*Foster and Elam* v. *Neilson*, 2 Pet., 253), and that the war has ended.

It is not bound, however, to assume that this jurisdiction may be exercised independently of the Constitution because another branch of the Government or even its chief law officer asserts it may do so. That is a judicial question which may be referred here on the demand of any person injured in his person or property by the exercise of any power claimed under the Constitution or right denied to him to which he claims himself entitled under its provisions.

The first case in which the question whether territory acquired subsequently to the formation of the Constitution was a part of the United States was submitted to this court's consideration was that of *Insurance Company* v. *Canter*, 1 Pet., 511. In that case Mr. Webster said:

> "What is Florida? It is no part of the United States. How can it be? How is it represented? Do the laws of the United States reach Florida? Not unless by particular provisions.
>
> "The territory and all within it are to be governed by the acquiring party except where there are reservations by treaty.
>
> "By the law of England, when possession is taken of territories, the King, *jure coronae*, has the power of legislation until Parliament shall interfere. Congress have the *jus coronae* in this case, and Florida was to be governed by Congress as she thought proper.

"What has Congress done? She might have done anything; she might have refused the trial by jury, and refused a legislature. She has given a legislature to be exercised at her will and a government of a mixed nature, in which she has endeavored to distinguish between State and United States jurisdiction, anticipating the future erection of the territory into a State.

"Does the law established in the court at Key West come within the restrictions of the Constitution of the United States? If the Constitution does not extend over this territory the law can not be inconsistent with the national Constitution."

The case was decided upon the last point only by holding that a case in admiralty is not one arising under the Constitution of the United States, and that a law giving jurisdiction to subordinate courts created by act of the Territorial legislature by authority of Congress was not invalid as having been made by a court not recognized by the Constitution. In short, the Territorial courts are not courts of the United States within the grant of judicial power. Mr. Justice Johnson, in the court below, passed upon the question of the relations of the territory to the Constitution, and was of the opinion that it bore no relations thereto until extended by act of Congress. Much stress is put upon his expressions to that effect in the brief of the Attorney-General. That such was not the opinion of Chief Justice Marshall and his associates is manifest from the language used:

"The treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition independent of stipulation."

It is obvious that this would not have been said if the court had supposed such a stipulation necessary. The treaty did not purport to admit the inhabitants to the immediate enjoyment of such rights, privileges, and immunities. The language of the sixth article was:

"The inhabitants of the territories, which his Catholic Majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."

This relates to the political and civil status of the inhabitants, not to the territory. Florida was not admitted as a State until 1845.

The contention now is that such inhabitants are not so admitted until Congress acts; that it is the sole and exclusive judge when their admission is consistent with the Constitution. The court did not so hold, but, on the contrary, made the treaty a present grant, though it did not purport to be so, and added the intimation that such would be the effect of acquiring the territory in the absence of any stipulation. This language is very significant, in view of the language used by the court below. As the case was not to be decided on that point, it must be presumed that nothing would have been said on that subject had not the court disapproved of the opinion of the court below.

This disapproval is clearly expressed upon another branch of the same subject. Mr. Webster in argument had asserted that Florida had

not become by the cession of Spain a part of the United States; Mr. Whipple, that the United States consisted only of States and the Constitution had no efficacy beyond States, except through act of Congress. Mr. Justice Johnson, in his opinion, went to the full extent of these arguments. The learned Chief Justice and his associates were of a different opinion. The court said:

> "If it be ceded by the treaty, the acquisition is confirmed and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or on such as its new master shall impose."

It is customary to say that this was *dictum*, and, in a sense, such statement is true. It is deliberate and well-considered *dictum*, however, called forth by the argument of able counsel and to correct the erroneous utterances of a member of the court. This decision was in 1828, and we know that the court did not agree with counsel and Mr. Justice Johnson in their assertion that Florida was not an integral part of the United States, but only a sort of appendage, outlying possession or colony, because, in *Loughborough* v. *Blake*, 5 Wheat., 317 (1820), the court had said (Chief Justice Marshall) that there could be but one answer to the inquiry as to the meaning of the term "United States" in the section of the Constitution requiring uniformity in the levy of duties, etc., and that answer was that it designated the whole of the American Empire.

> "It is the name given to our great Republic, which is composed of States and Territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania."

In the light of this language, it is singular that the Canter Case is cited upon the Government brief as holding in effect that Florida was not a part of the United States.

In our principal brief we have quoted from *Pollard's Heirs* v. *Kibbe*, 14 Pet., 353 (decided 1840), as showing that the consent of Congress was not required to make territory a part of the United States. The consent of the treaty-making power was sufficient for that purpose. It is evident that the words "incorporation into the Union" are used by the court as equivalent to the acquisition of the complete sovereignty and dominion over territory. The court is quoted by us as follows:

> "It matters not by what right the United States held the disputed territory at the time of its incorporation into the Union; had it been done without the color of right, or had East Florida been so incorporated before the treaty of 1819 the consequences would have been the same; by the very and sole act of such incorporation the inhabitants became citizens of the United States, their property was protected, and alien proprietors became entitled to all rights secured to them by any treaty between their sovereign and the United States."

The Attorney-General quotes (p. 117, A. G. Brief) the preceding paragraph of Mr. Justice Baldwin's opinion, emphasizing the words "*From the moment of such incorporation* the Constitution of the United States and its amendments interposed between the inhabitants and the legislative power of the United States the same guarantee which any

citizen of any other State had a right to claim for the enjoyment of his property." The Attorney-General adds:

> "From this it appears that the Constitution of the United States was not held to interpose between the inhabitants and the legislative power of the United States in the territory ceded by Louisiana in 1783 until the territory had become actually incorporated into the Union as a State." (A. G. Brief, p. 116.)

That such is not the meaning of the court in using the word "incorporation" is manifest from the following:

> "That such incorporation was by acts of sovereign power by the United States exerted by military operations expelling the existing authority of Spain, and compelling the inhabitants to submit to that of the United States, so far from diminishing increases their constitutional and treaty obligations.
>
> * * * * * * *
>
> "The inhabitants submitted, and thereby became entitled to the threefold protection of the Constitution, treaty, and law of nations."

It is respectfully submitted:

1st. That territory can not be incorporated into the Union *as a State* by acts of sovereign power exerted by military operations.

2nd. That the decision asserts that *territory* incorporated by conquest becomes subject to the Constitution.

The next case was that of *Fleming* v. *Page*, 9 How., 603, decided in 1850.

In the war with Mexico the State of Tamaulipas was temporarily occupied by our arms. This included the port of Tampico, from which, during such occupation, goods were imported into Philadelphia. The question was whether Tampico ceased to be a foreign country during such military occupation.

There can be no doubt this case was correctly decided upon the question before the court. There was no intention to make the territory from which the shipment was made a part of the United States. It was only temporarily occupied for military purposes. The allegiance of the inhabitants was temporarily changed for military reasons and in the interest of mercy or humanity. There can be no doubt the citizenship of the inhabitants remained the same and their duty of allegiance was reinstated as soon as the military occupation terminated. The second reason was that the President had no capacity to extend the limits of the United States—there is involved in the statement of this reason a denial of the position of the Government in the case at bar. It is said that the limits of the United States have not been enlarged by the late cessions, as the United States mean "the States united." The court said:

> "The United States, it is true, may extend its boundaries by conquest or treaty and may demand cession of territory as the condition of peace. * * * But this can only be done by the treaty-making power or the legislative authority and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. * * * But his conquests do not enlarge the boundaries of this Union, nor

extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power."

The implication is plain that if the treaty-making power or legislative power had acted, such action both had the effect to extend the boundaries of the United States and to extend our institutions and laws beyond the limits before assigned to them. The court continued:

"*For every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws.*"

And then points out that our occupation was of an hostile country to distress and harass the enemy. Our troops were in an enemy's country and not our own. The third reason assigned was that Congress had not established a custom-house at Tampico, authorized the appointment of a collector, and consequently there was no officer of the United States authorized by law to grant the clearance and authenticate the coasting manifest of the cargo in the manner directed by law, where the voyage is from one port of the United States to another, a condition which could not have been created under the conditions described.

The discussion on the compromise of 1850 brought the question of the relations of the Constitution to the Territories again into great prominence. The Oregon boundary question and the possible loss of that Territory, the annexation of Texas, the war with Mexico and the consequent increase of territory had all served to intensify the struggle before entered upon between the advocates of the extension of slavery and those opposed thereto. Each party sought to gain advantage to itself in these new possessions. Calhoun asserted that slavery was recognized in the Constitution and that Congress had no power to exclude slavery from the Territories; Webster, that Congress governed the Territories wholly independent of the Constitution. Impartial jurists and historians, who have since examined the question, have agreed that both were wrong in the full extent of their contentions. As is usual in debate upon great questions, where party feeling runs high the participants go to extreme lengths in their advocacy. Never was this more apparent than in the debates upon this question of the extension of slavery, which then threatened and afterwards so nearly accomplished the ruin of our nation.

I know of no better statement of the true line between the arguments of Mr. Webster and Mr. Calhoun than that of Dr. Von Holst in his Constitutional History of the United States (Vol. 3, pp. 445–447), where he says:

"Calhoun was evidently right, although Webster had good grounds for astonishment that the radical upholder of States rights should support this view. The United States have, outside of the Constitution, no legal existence. The relation of the Union to the Territories is, therefore, a legal relation in and under the Constitution, which is wholly independent of the legislation of Congress, of which it in fact is the basis. The fact that the legislative action of Congress is required in order to make this legal relation effective is by no means, as Webster seemed to think, in contradiction with this assertion, for, as Calhoun rightly said, the legislative action of Congress is equally necessary in order to put in operation the provisions of the Constitution relating to the States. Unquestionably there is an essential difference between the nature of the

legal relation of the States to the Union and that of the Territories. The distinction, following Webster's line of thought, is sharply indicated by Cooley's saying: 'The Constitution was made for the States, not for Territories.' Yet the proposition must not be interpreted too literally. The United States had a territorial domain even under the articles of confederation. This the Constitution could not possibly overlook, and it has accordingly, in express words, assigned to the Territories their place in the organism of the Union; to this extent, therefore, it was made for the Territories. Thus, though the Territories are possessions of the United States, we shall be obliged to concur unconditionally with the Supreme Court which, in contradiction to Webster in a later decision, repeatedly designates them also as a 'part' of the United States. And equally incontestable is its further declaration, that the powers of the Federal Government with regard to the persons and property of the citizens of the Territories can not be other or greater than those granted it over the citizens of the States. Calhoun himself had asked whether Congress could create a nobility or an established church in the Territories. If from this he drew the conclusion that the positive provisions of the Constitution, as well as the negative, must hold good for the Territories, his proposition, thus generally stated, was evidently not true. This he himself recognized by admitting that the provisions of the Constitution were not all applicable to the Territories. Apart, then, from the theoretic question, the contest between him and Webster was reduced to the single question, What provisions of the Constitution were applicable to the Territories?"

The decision referred to is *Dred Scott* v. *Sandford*, 19 How., 449, and cited at length in our original brief. The learned author continues:

"The Territories were not colonies which were destined permanently to maintain a separate existence under the Union, but they were embryo States with the legal expectancy of becoming equal constituent members of the Union. The character of their political and social organization was, therefore, an essential determining factor in the future of the Union. To leave it to them to form this organization wholly according to their own good pleasure would be, *pro tanto*, to renounce all effort to give the development of the Union a particular direction and to secure its preservation.

* * * * * * *

"Calhoun's assertion that the Territories belonged to the 'thirty States,' and that, therefore, the citizens of every State could take with them into the Territories the rights which rested solely upon the municipal institutions of their respective States, and the doctrine of squatter sovereignty, therefore, were equally absurd if the Union was acknowledged to be a nation in any sense of the term and not a mere international league. But, whatever its original legal character might have been, all the dialectics in the world could not argue away the fact that it never really had been such a mere league, and, therefore, also the founders of the republic had never been guilty of the monstrous absurdities imputed to them both by the Calhoun and the Cass-Dickinson schools."

It is upon this distinction that we build our opposition to the taxation of commerce between these possessions and the other portions of the United States. "The United States have, outside of the Constitution, no legal existence. The relation of the Union to the Territories is, therefore, a legal relation in and under the Constitution, which is wholly independent of the legislation of Congress, of which it, in fact, is the basis."

Congress extends the Constitution to no place or people. It exercises powers given it by the Constitution upon persons and places within its jurisdiction. Where power is given, it is the judge of the ways and means appropriate to its exercise, with the single exception that if the Constitution has limited the scope and extent of such powers and their exercise Congress may never lawfully ignore such limitations. It, like every other agent exercising powers, is everywhere accompanied by the limitations upon that power as between the donor and such agent. In our Government the people are the donors, and any one individual of the people can challenge the exercise where his personal rights are involved.

We have seen that in *Cross* v. *Harrison* many of the points in dispute in this memorable debate, and from which the Attorney-General has quoted so copiously, were decided against Mr. Webster's views as expressed in the Canter case and the Senate. The court there held that by the treaty of cession California became a part of the United States, and that the constitutional prohibitions against taxation of commerce between such Territory and other parts of the United States, as well as the one providing that "all duties, imports, and excises shall be uniform throughout the United States," were immediately applicable without Congressional action.

In holding the then tariff laws applicable likewise without Congressional action, the court but asserted the incontrovertible principal that the civil government erected upon the discontinuance of the military was restrained by these same prohibitions, and that uniformity required by the Constitution could only be attained by enforcing the tonnage and customs laws prevailing elsewhere in the United States.

The next case was that of *Dred Scott* v. *Sandford* (19 How., 393). It has been sufficiently discussed in our principal brief. We have quoted at length from the opinion of Chief Justice Taney. It must be admitted that, accepting this case as law in this court, it is decisive against the Government in the one at bar. The learned Attorney-General recognizes this fact and seeks to escape its results by saying:

> "That doctrine rests upon the proposition that the authority of the United States to acquire territory is derived solely from the power to create and admit new States, which power is conferred upon Congress by section 3 of article 4 of the Constitution. The Dred Scott case is the only case in which this proposition has ever been accepted. What is popularly supposed to have led to its acceptance in that case is matter of history, not of law. It is sufficient for the purposes of this investigation to call attention to the fact that Chief Justice Taney's major premise was in direct contravention of the doctrines established by the prior decisions of the court and by the course of Congressional action, and has been ignored and completely overthrown by the subsequent decisions of the court, to say nothing of the tremendous results of the civil war." (A. G. brief, pp. 151, 152.)

This is in connection with a quotation from the Chief Justice's statement that territory "is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority." It is to be noted that the Attorney-General is inaccurate in his criticism of this language, as the Chief Justice did not say that the power was derived from the power to create and admit new States, but that it could only be exercised for that purpose. In *Cross* v. *Harrison* the court had recognized the right to acquire territory by cession, conquest, or discovery. It is not to be presumed the same court had changed its ground in these few years. Nor is it true that this case is the only case where this purpose has been so recognized. Mr. Webster himself, in his speech of March 23, 1848, said:

> "Arbitrary governments may have territories and distant possessions, because arbitrary governments may rule them by different laws and different systems. We can do no such thing. They must be of us, part of us, or else strangers. I think I see a course adopted which is likely to turn the Constitution of the land into a deformed monster, into a curse rather than a blessing—in fact, a frame of an unequal Government, not founded on popular representation, not founded on equality, but on the grossest inequality; and I think that this process will go on until this Union shall fall to pieces. I resist it to-day and always. Whoever falters or whosoever flies, I continue the contest."

This court, speaking by Mr. Justice Shiras, in *Morris* v. *United States*, 174 U. S., 196, 237, declared the same purpose when it said:

> "Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by a treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States for the benefit of the whole people and in trust for the several States to be ultimately created out of the Territory.

I might multiply instances from the language used by this court as well as leading statesmen to the effect that our Constitution does not admit a colonial system. But why pursue this phantom? The Attorney-General is the first lawyer of distinguished rank who has ever asserted such a doctrine in this court. He is answered before he began by your decisions through a long course of years and reaching to the present time.

With the decisions in *Fleming* v. *Page*, *Cross* v. *Harrison*, and *Dred Scott* v. *Sandford* the question was put at rest, both as a legal and political one. It is true that occasionally some lawyer has attempted to reopen it here, but the controversy has met but scant respect at your hands.

In *United States* v. *Reynolds*, 98 U. S.; *National Bank* v. *Yankton*, 101 U. S., 129, 133; *City of Panama*, *Id.*, 453, 460; *Murphy* v. *Ramsey*, 114 U. S., 44; *Chicago & Pacific Ry.* v. *McGlinn*, *Id.*, 542, 546; *Callan* v. *Wilson*, 127 U. S., 540, 549, 551; *Springville* v. *Thomas*, 166 U. S., 707, 708; *Thompson* v. *Utah*, 170 U. S., 343, 347, 348; *Capital Traction Co.* v. *Hof*, 174 U. S., 1, 5, and other cases, the application of the Constitution in its operation as "coextensive with our political jurisdiction" and not to be given or taken away by Congress is asserted in varying words but never-varying meaning.

The action of the Executive Departments in all respects has conformed with the views of this court in these cases until the present Administration, the learned Attorney-General's statement to the contrary notwithstanding.

This policy was reversed for reasons which can not be discussed in this court. The question whether this court shall reverse its decisions is matter of legitimate discussion. You can not have any *policy*, except the one included in your oaths of office. An Administration may have, if you advise it through your decision that the Constitution has acquired another meaning since the war with Spain than it before possessed; that it is an instrument designed by its makers to serve the needs of policy, and to these needs the principles of liberty and self-government may be sacrificed. There are two utterances of this court, one of an earlier, the other of a recent date, with which I answer this unseemly demand.

In *Marbury* v. *Madison*, Chief Justice Marshall said:

> "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" And he answered: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be that an act of the legislature repugnant to the Constitution is *void*."

In *Chicago, Milwaukee, &c., R'y* v. *Tompkins*, 176 U. S., 167, 172, the court, speaking by Mr. Justice Brewer, quoted *Yick Wo* v. *Hopkins*, 118 U. S., 356, 369, as follows:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

Mr. Justice WHITE. You stated at the commencement of your argument that you eliminated certain questions discussed by the Attorney-General as not involved in these cases, among others the status of the native inhabitants. Is not that question necessarily involved here?

Mr. ALDRICH. If I may have the time I will enter upon that subject. In the first place the Philippine Archipelago and all sovereignty and dominion over it is ceded by Spain. The grant is not a qualified or restricted one. There is not a word or syllable in the treaty of cession designed to qualify the cession of these islands and the waters thereof as such, or the dominion of the United States over them. The same effect should therefore be given to the grant as all other grants of like character have received. Our contention is that such grants have always been held to make the lands so ceded a part of the United States, as Chief Justice Marshall defined the term in *Loughborough* v. *Blake*.

The question of uniformity under the Constitution in the application of the impost and excise laws, as well as the provisions as to preferences between ports, etc., are provisions relating to *place*, *locality*, and have nothing to do with the citizenship or status of persons.

The emphasis placed by the Attorney-General upon this question of

the status of the native inhabitants and the alarming consequences of citizenship is designed to furnish a reason why this court should adopt his construction rather than ours of the powers of Congress in the Territories. In other words, a plenary power in Congress, free from constitutional restraint, is to be found or not found in the Constitution, as this court may view the consequences of such discovery or failure to discover this unrestrained power in that instrument. This method of interpretation reminds one of Mr. Justice Curtis's language in *Dred Scott* v. *Sandford*, where he said (19 How., 620, 621):

> "Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a constitution; we are under the government of individual men, who, for the time being, have power to declare what the Constitution is according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican government, with limited and defined power, we have a Government which is merely an exponent of the will of Congress, or what, in my opinion, would not be preferable, an exponent of the individual political opinion of the members of this court."

I have no brief in behalf of the native inhabitants of these islands or opposed thereto, and can therefore only express my own opinion as to their status. The treaty nationalizes the citizens of Spain who do not by affirmative act elect to retain their Spanish citizenship. We have thus acquired territory and citizens to that extent. The treaty plainly evinces an intention to leave the status of the native inhabitants to the subsequent determination of Congress. This I think was competent. And in subsequently determining this question I do not believe that a decision by this court that the clauses relating to imports and preferences as to these ports are within the Constitution and forbidden, would be equivalent to holding that these native inhabitants must become citizens. I think the court could be well guided by the decisions holding that members of Indian tribes owing allegiance to such tribes, though dwelling within the United States, are not citizens of the United States within the fourteenth amendment to the Constitution. My understanding of *Elk* v. *Wilkins* (112 U. S., 44) and *United States* v. *Wong Kim Ark* (169 U. S., 649) has led me to this conclusion. It is my belief that this exception by which the Indian owing a tribal allegiance is held not to be (wholly) subject to the jurisdiction of the United States, and hence not within the fourteenth amendment, rests not upon anything contained in the Constitution, but upon the common law, by the principles of which the words of the Constitution must be interpreted.

I turn now to the argument of the Attorney-General based upon the language found in the thirteenth amendment to the Federal Constitution. It is provided that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." It seems to be supposed by the Attorney-

General that in the use of the words "subject to their jurisdiction" an intention was evinced to provide in the Constitution for colonial possessions as distinct from the term "the United States." If we consider but a moment the history of the times we shall find that no such deduction is warranted. The thirteenth amendment was adopted December 18, 1865.

On April 16, 1862, an act of Congress was passed which abolished slavery in the District of Columbia, in the following words:

> "From and after the passage of this act neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist in said District." (12 Stats., 376.)

On June 19, 1862 (12 Stats., 432, 811), Congress passed an act abolishing slavery in the Territories, providing—

> "that from and after the passage of this act there shall be neither slavery nor involuntary servitude in any of the Territories now existing or which may at any time hereafter be formed or acquired by the United States, otherwise than in punishment of crimes wherein the party shall have been duly convicted."

On January 1st, 1863, President Lincoln issued his Emancipation Proclamation, in which, after setting forth that certain States and parts of States were in rebellion, he declared that "all persons held as slaves within said States and parts of States are, and shall henceforth be, free." It was after this that the amendment to the Constitution was proposed. On March 29, 1864 (Annals 38th Congress, p. 1313), it appears that—

> "the joint resolution, as originally introduced by Mr. Henderson (Senator from Missouri), proposed the following articles as amendments to the Constitution of the United States:
>
> "ART. 1. Slavery or involuntary servitude, except as a punishment for crime, shall not exist in the United States."

The Committee on the Judiciary (Mr. Trumbull, of Illinois, chairman) proposed an amendment to strike out all after the resolving clause and insert the following, as set forth in the joint resolution of the Senate No. 16:

> "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.
>
> "Congress shall have power to enforce this article by appropriate legislation."

The Senate resolution (No. 16), as amended by the Senate Judiciary Committee, passed Congress, and was approved on February 1, 1865 (13 Stat. L., 567), and the amendment was published as ratified on December 18, 1865. (*Ib.*, 774.) On March 28, 1864 (Congressional Globe, 1st sess. 38th Cong., p. 1325), Mr. Stevens (Pa.) introduced a resolution in the House of Representatives, as follows:

> "ART. 1. Slavery and involuntary servitude, except for the punishment of crime whereof the party shall have been duly convicted, is forever prohibited in the United States and all its Territories."

Senator Trumbull, as chairman of the Committee on the Judiciary, in the commencement of his speech said, in respect to the amendment of the resolution proposed by his committee:

> "It is a proposition so to amend the Constitution of the United States as forever to prohibit slavery within its jurisdiction." (Globe of March 29, 1864, p. 1313.)

The pronoun "its" here relates, grammatically speaking, to the noun "Constitution." This construction implies an admission that the Constitution extends over the entire United States, or, what is the same thing in effect, that the Constitution when so amended would extend wherever the sovereign jurisdiction of the United States might exist. Senator Wilson evidently entertained the same view as to the scope of the Constitution. In his great speech on that occasion, wherein he arraigned slavery as the *fons et origo* of the rebellion, and demanded its destruction, he used this language: "This proposed amendment of the Constitution prohibiting the existence of slavery forevermore in the Republic of the United States." (Globe, March 27, 1864, p. 1319.) It may be asked, if this was the view of the operation of the Constitution, why was it considered necessary to amend the resolution as originally introduced by Senator Henderson by adding to it, after the words "United States," the words "or any place subject to their jurisdiction?" It is evident that this was done out of an abundance of caution. It was the purpose of Congress in proposing this amendment to leave no possible grounds to question the scope thereof. The status of the States in rebellion was at that time a subject of frequent discussion in Congress, one party contending that eleven States had departed from the Union by virtue of their secession ordinances; and that party was frequently proposing that offers of compromise should be made to these eleven States in order "that the union of States" so "dissolved" might be "restored." The other party was steadily denying that any such result had followed the ordinances of secession, and up to a certain period this party insisted that such ordinances were wholly inoperative and void. When the reconstruction period approached, for reasons largely political, as we must assume, the attitude of many leaders of the Republican party changed, and they often asserted that the rebellious States had placed themselves out of the pale of the Constitution, and were without any "status of statehood," or any right of representation in Congress or in any department of the Government of the United States, and would so remain until they purged themselves of the crime of rebellion and Congress should admit them to Federal relations. In other words, the Republican leaders in Congress, *while war was flagrant*, denied that the Union could be destroyed by secession; later they held that no seceded State had the same status as a loyal State. In fact, some of the great statesmen of the time contended that not only had their statehood been destroyed, but that they were not even in the status of organized Territories. At one time the Democratic leaders took the more radical position, and contended that in fact and in law these States were no longer any part of the United States, and, therefore, as I have said, they frequently urged that terms for their restoration to the Union should be offered to them. This was in effect a recognition of the Confederacy as a legally established government, and a proposition to treat with it as an independent nation, which

could appoint diplomatic agents or commissioners to negotiate with commissioners to be appointed by the United States for terms of peace and terms by which the seceded States should return to the Union.

At a later period, when the rebellion had been practically suppressed, it was the Democratic leaders who took the position, afterwards sustained by this court, that secession had not been effective to destroy the Union, and that the States were never in reality out of the Union. As examples of these varying positions, we find (Congressional Globe, p. 2613, May 31, 1864) that Mr. Morris, of New York, said:

> "But as to the question, What is the status of the States in rebellion? Are they really in or are they actually out of the Union? Paradoxical as it may seem, I hold that they are neither, and yet they are both."

Referring to certain members, he said:

> "They are in favor of a return of the revolted States to the Union. * * * (Cong. Globe, 2613.)"

Referring to the revolted States, he said:

> "Till they are pardoned and returned to favor they are not to be counted among the States of the Union."

Mr. Stevens, "the great commoner," and who was the Republican leader in the reconstruction acts, maintained successfully in the 38th and 39th Congresses the power of Congress to govern the insurgent States as Territories. Taking the President's message for his text, he said in one of his speeches:

> "The President assumes, what no one doubts, that the late rebel States have lost their constitutional relation to the Union, and are incapable of representation in Congress, except by permission of the Government. (Three Decades of Federal Legislation, by S. S. Cox, p. 367.)"

He contended that they were only "dead carcasses lying within the Union," and that Congress alone could restore to them "the breath of life anew," under the provision of the Constitution "for the admission of new States into the Union. (*Ib.*, 367, 368.)

The debates in the Senate on the same subject exhibit the same conflict in the views and policies of the two great parties, the Republican leaders maintaining that by secession and rebellion the rebel States had destroyed their own State organization, and had thereby assumed the character of Territories, and that at the end of the rebellion they were reduced to obedience to the United States without any rights as States in the Union, and hence were subject to be governed by such instrumentalities as the Constitution has provided for Territories. (*Ib.*, 357.)

Mr. Reverdy Johnson, speaking for the Democratic party, contended that the rebel States did not and could not commit *felo de se;* that their ordinances of secession were null and void; that secession did not "dissolve the Union;" and hence that the eleven States that were lately in rebellion were still "States of the Union," and entitled, as such States, to all the rights of States under the Constitution of the United States. As these debates were carried on in the same Congress that proposed the thirteenth amendment to the Constitution, we can

well understand that the framers of that amendment might be, and no doubt were, in great doubt as to whether, if the amendment were adopted as originally proposed by Senator Henderson (or by Mr. Stevens in the House), it would apply to the eleven States then in rebellion, which had, in the opinion of many, forfeited their statehood, and which would, if the Union could be restored, become subject to the jurisdiction of Congress as conquered territory. The words "or any place subject to their jurisdiction" were therefore made a part of the amendment. And Mr. Stevens had contended that the decision of this court in the prize cases (2 Black, 66) was regarded as contributing to that doubt.

Here were sufficient grounds for doubt as to whether, after the rebellion was suppressed, the court would hold that the rebel States had been "out of the Union," and whether while they were so out they were or were not a part of the United States, and whether, when the thirteenth amendment should be adopted and become a part of the supreme law of the land, it would apply to them at the end of the rebellion unless they could then be regarded as conquered territory, subject to the jurisdiction of the United States.

It will be seen that these debates and differences of opinion afford another illustration of the differences that had existed prior to the civil war with reference to the subject of slavery in the Territories and the power of Congress in relation thereto. There is no hint or suggestion by any person speaking on the subject that it was desirable, as the Attorney-General would have you infer, to introduce into the Constitution words recognizing that we might need to embark on a colonial policy which would enable the United States to accept grants of territory and assume the government of places as places within their jurisdiction, but not an integral part of themselves.

In conclusion, I make no appeal to this court upon other than constitutional and historical grounds. Absolute power is dangerous, more so to its possessor than to the people subject thereto. I feel assured that you, familiar with all the battles for freedom which have adorned and elevated the human race in its evolution from barbarism to civilization, will not find that any agency of the freest people on earth, the foundation of whose Government was everywhere welcomed as the greatest political achievement of all time, is possessed of absolute or unrestrained power over these lands and peoples brought within our direct influence and control. Your decision will carry to them, not the assertion of arbitrary power over their future, but the assurance that theirs shall be a government limited by that instrument which every citizen should regard as the only source of Federal power.

No. 419.—October Term, 1900.

FOURTEEN DIAMOND RINGS, ETC.,

v.

THE UNITED STATES.

For briefs and arguments in behalf of the United States in this case, see No. 340, Goetze *v.* United States.